Supreme Court, U. S.
FILED
DEC 27 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1978

No. 78-1039

JOSEPH FARINO,

Petitioner,

v.

ALBA FARINO,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

IRWIN POPKIN
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In the

Supreme Court of the United States

October Term, 1978

No.

JOSEPH FARINO,

Petitioner,

v.

ALBA FARINO,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

Petitioner, defendant in the Court below, prays that a writ of certiorari issue to review the final order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered herein on May 15, 1978.

ORDERS AND OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Suffolk County (Hon. Leon D. Lazer) dated December 20, 1976 granting respondent a divorce and awarding her alimony, child support and counsel fees is reproduced as Exhibit "A" hereto. It has not been officially reported.

The judgment of divorce of the Supreme Court of the State of New York, Suffolk County, dated January 21, 1977, and entered in the office of the Suffolk County Clerk on January 25, 1977, is reproduced as Exhibit "B" hereto.

The opinion of the Supreme Court of the State of New York, Suffolk County (Hon. Leon D. Lazer) dated July 25, 1977, denying petitioner's application for a downward modification of the economic incidents of the judgment of divorce is reproduced as Exhibit "C" hereto. It has not been officially reported. The order of said Court dated July 28, 1978 entered in furtherance of said decision is reproduced as Exhibit "C-1" hereto.

The order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on May 15, 1978, is reproduced as Exhibit "D" hereto, and the decision accompanying same, reported at 63 A.D. 2d 691, is reproduced as Exhibit "D-1" hereto.

The order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on July 10, 1978, denying petitioner leave to reargue, or in the alternative, leave to appeal to the Court of Appeals of the State of New York, reported at —A.D. 2d — is reproduced as Exhibit "E" hereto.

The order of the Court of Appeals of the State of New York entered September 26, 1978, denying petitioner leave to appeal reported at —N.Y. 2d—, is reproduced as Exhibit "F" hereto.

The order of the Court of Appeals of the State of New York entered on November 28, 1978, denying petitioner's application for reargument of his request for leave to appeal, reported at —N.Y. 2d—, is reproduced as Exhibit "G" hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether Sections 236 and 237 of the New York Domestic Relations Law violate the equal protection provisions contained in Amendment 14, Section 1 of the Constitution of the United States. These statutes provide that an obligation to pay either or both alimony and counsel fees may be imposed only upon a husband and not upon the wife. Is such a gender founded distinction tolerable under the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14, Section 1 of the Constitution of the United States, insofar as is pertinent provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

New York Domestic Relations Law, Section 236, insofar as is pertinent provides:

> "In any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of the wife to be self supporting, the circumstances of the case and the respective parties."

New York Domestic Relations Law, Section 237, insofar as is pertinent provides:

> (a) "In any action or proceeding brought (1) to annul marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, the court may direct the husband, or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, to pay such sum or sums of money to enable the wife to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties."

STATEMENT OF THE CASE INCLUDING RAISING THE CONSTITUTIONAL QUESTION

On December 20, 1976, the Supreme Court of the State of New York, County of Suffolk, by Mr. Justice Leon D. Lazer, rendered a decision awarding respondent alimony in the sum of $275.00 per week, child support in the sum of $150.00 per week and counsel fees in the sum of $7,500.00.

On July 25, 1977, an unsuccessful attempt to modify that decree by petitioner in the trial court resulted in an award of an additional $1,500.00 in counsel fees to the respondent.

On May 15, 1978, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, unanimously affirmed these financial awards.

On June 20, 1978, petitioner moved before the said Appellate Division for leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals of the State of New York. In that motion petitioner, for the first time, raised the issue with respect to the constitutionality of New York's alimony statutes. Although petitioner's application was denied on July 10, 1978, in all respects by the said Appellate Division, petitioner effectively preserved that constitutional issue under New York Law for purposes of seeking further review.*

Petitioner's application for leave to appeal to the Court of Appeals of the State of New York, in which the constitutional issue was once again raised, was denied on September 26, 1978, and a further application to that Court for leave to reargue the motion for leave to appeal was denied by order entered on November 28, 1978.

REASONS FOR GRANTING THE WRIT

This court is being asked to invalidate the New York State alimony statutes on the grounds that they violate the Equal Protection Provisions contained in the Fourteenth Amendment to the Constitution.

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*See, Cohen & Krager, Powers of the New York Court of Appeals, Section 169, p. 642, where the author states: "Indeed, there is some authority in the Court of Appeals that, if only a general exception is taken to a judgment which can be assailed on constitutional grounds, it is sufficient to raise the constitutional question of appeal". Also, *Howard v. The City of New York*, 234 N.Y. 505, *Massachusetts National Bank v. Shinn*, 163 N.Y. 360.

Directly attacked are New York Domestic Relations Law Sections 236 and 237. The former permitting an award of alimony and the latter an award of counsel fees, both solely for the benefit of the wife and neither providing a corresponding benefit to the husband.

This Court declined to review the constitutionality of the similar Georgia Alimony Statutes, when challenged in *Murphy v. Murphy*, 232 Ga. 352, Cert. denied 421 U.S. 929 (1975).

Murphy, notwithstanding, the same issue was squarely before this Court in *Orr v. Orr* (No. 77-1119) on appeal from the Supreme Court of Alabama, 351 So. 2d 906 (1977) which was argued before this court on November 27, 1978.

If the very same constitutional issue warranted consideration when presented by *Orr*, the petitioner's prayer for relief must also be worthy of consideration. Furthermore, the court in this instance is not distracted by the collateral issue with respect to the propriety of judicial interference with contractual obligations that may be present in *Orr*, as a result of the written stipulation which was incorporated into the judgment of divorce in that instance. In both cases, a wife who claims a financial need is seeking relief from a husband concededly capable of providing the same.

In considering the instant application, it is urged that the fact that the New York Appellate Courts did not address themselves in this case to the constitutional issue raised herein does not in any way reflect upon the substantiality of that question.

The position of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the Court to which the writ here is sought, was made very clear in *Childs v. Childs*, 60 A.D. 2d 639, appeal dismissed, 43 N.Y. 946, Petition for Writ of Certiorari filed with this Court on

May 19, 1978 (No. 77-1653). That Court in *Childs* held that a husband who does not seek or require alimony or counsel fees lacks the requisite standing to challenge a statute which unilaterally imposes that obligation upon him.

Implicit in this Court's consideration of *Orr*, is the acknowledgment that a husband who is required to pay has sufficient standing to challenge the constitutionality of the statute authorizing such payment. See also, *Stern v. Stern*, 165 Conn 190, 332 A.2d 78 (1973).

This court has in recent years repeatedly invalidated statutes providing dissimilar treatment for men and women. In *Reed v. Reed*, 404 U.S. 71 (1971), it invalidated a statute giving preference to a male of the same relationship class in the selection of an administrator of an estate. In *Frontiero v. Richardson*, 441 U.S. 677 (1973), an armed forces directive which exempted males from proving the actual dependence of their spouses in order to qualify for an increased living allowance but mandate such a showing by females was invalidated. See also, *Schlesinger v. Ballard*, 419 U.S. 498 (1975) *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), *Stanton v. Stanton*, 421 U.S. 7 (1975).

Despite the apparent reluctance of the Court of Appeals of the State of New York, in both *Childs* and this case, to accept the opportunity to address itself to the presented issue, there has been an increasing recognition by members of the New York Judiciary that the statutes attacked on this appeal, and similar statutes, are constitutionally suspect, particularly in view of the above mentioned prior decisions of this Court. In *Fomenko v. Fomenko*, 50 A.D. 2d 712, 374 N.Y.S. 2d 882 (1975), the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, in dismissing a constitutional attack on New York Domestic Relations Law Section 236, made by a wife who was denied alimony because she was found guilty of misconduct constituting grounds for divorce, recognized that:

> "As between husbands and wives, it may well be argued that the statute discriminates, if at all, against husbands who are wholly denied alimony by the statute regardless of the circumstances."
> 375 N.Y.S. 2d at 845.

In *Bauer v. Bauer*, 55 A.D. 2d 895, 390 N.Y.S. 2d 209 (1977), the majority of the Justices failed to reach the issue with respect to the constitutionality of New York Family Court Act Sections 413 and 414, which imposed a primary duty of the support of children upon the father regardless of the mother's circumstances. In a concurring opinion, by Mr. Justice Latham, quoting from the opinion in *Carol K. v. Arnold K.*, 85 Misc. 2d 643, 380 N.Y.S. 2d 593 (1976) it was recognized that:

> "...sexual generalization in the law of support is the quintessence of unconstitutionality." 390 N.Y.S. 2d at 212

In *Marcia D. v. Donald D.*, 85 Misc. 2d 637, 380 N.Y.S. 2d 904, New York Family Court Act Section 438, which provides for the payment of counsel fees in a support proceeding to the wife or former wife, and not to the husband, was invalidated as being repugnant to the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.

In *Thaler v. Thaler*, 85 Misc. 2d 315, 391 N.Y.S. 2d 331 (1977), the Court recognized that:

> "...the New York alimony statute in permitting alimony to women and not to men is discriminatory without a rational basis. It offers an arbitrary value judgment on male-female roles. Its discrimination is solely gender based. Even if one were somehow to find the utter preclusion of men to be rational, the sex distinction fails because it is inherently 'suspect' and can be justified only by compelling state interests." 391 N.Y.S. 2d at 337.

Historically, the alimony and counsel fees provisions, contained in the statutes under consideration, relate back to the common law theory that a husband was liable for his wife's necessaries. The husband was 'the breadwinner' and the wife assumed the economically non-productive role of the homemaker with the knowledge and often the urging of that role upon her by the husband. This court has implicitly vitiated the presumption that wives are completely dependent upon their husbands for support in *Frontiero v. Richardson*, supra, and by the statistical findings contained in *Taylor v. Louisiana*, 419 U.S. 522 (1975), page 690, footnote 17:

> "Statistics compiled by the Department of Labor indicate that in October, 1974, 54.2% of all women between 18 and 64 years of age were in the labor force."

Accordingly, New York Domestic Relations Law Sections 236 and 237 can no longer be said to pass the "close judicial scrutiny" test enunciated in *Frontiero*, and must be declared invalid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ORDERS AND OPINIONS

EXHIBIT "A"

MEMORANDUM

Index No. 75-4373
7/20/76

Special Term, Part V
By Lazer, J.S.C.
Dated December 20, 1976

SUPREME COURT, SUFFOLK COUNTY

ALBA FARINO,

Plaintiff,

vs.

JOSEPH FARINO,

Defendant.

GOODMAN & GOODMAN, P.C.
Attorneys for Plaintiff
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Carle Place, New York 11514

JACK B. SOLERWITZ, ESQ.
Attorney for Defendant
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Mineola, New York 11501

At the commencement of the trial of this action in which the plaintiff seeks a divorce upon the grounds of cruel and inhuman treatment, the parties entered into a stipulation under which, inter alia, the defendant withdrew those portions of his answer which denied plaintiff's allegations relative to her grounds for divorce and also withdrew his counterclaim

for divorce. The parties were married in 1952, have five children, and the proof meets the other jurisdictional predicates for dissolution of the marriage under Domestic Relations Law § 230. Plaintiff testified that the defendant habitually indulged in violent outbursts of temper, calling her names and occasionally attempting to choke her; that he assaulted her in the presence of the principal and assistant principal at the high school attended by the two oldest boys; and that in 1972 he admitted to her that he was having an extramarital affair. Concluding that it was no longer safe to cohabit with him, she left the marital abode five months prior to commencement of this action. On this proof, she is entitled to a judgment of divorce pursuant to Domestic Relations Law § 170(1).

The principal issues are the usual financial ones. In their stipulation, the parties agreed that plaintiff should have custody of the three minor children, Marianne, born in 1962, Barbara Ann, born in 1961, Anthony, born in 1959, and that defendant should have custody of Joseph, born in 1957, and Fiore, born in 1956. Plaintiff seeks a substantial award of alimony and child support based upon the parties' alleged pre-separation standard of living and her husband's income and assets. In fixing the amount of alimony to be awarded, the Courts look first to Domestic Relations Law § 236 which provides that regard be had to the "length of time of the marriage, the ability of the wife to be self-supporting, the circumstances to be considered include the husband's financial resources and the established standard of living of the parties (see *Kover v. Kover*, 29 N.Y.2d 408, 328 N.Y.S.2d 641).

With respect to the pre-separation standard of living, plaintiff testified that during the year immediately preceding the separation in March of 1976, the parties lived in a $150,000.00 house in Bay Shore owned by the defendant which is his present residence. Prior to the purchase of the Bay Shore home, the parties lived for 13 years in a smaller eight-room house in Westbury. According to the plaintiff, it was the defendant's custom to give her his $241.00 paycheck plus an

additional sum of approximately $200.00 per week for living expenses, the use of a car and various charge accounts and, in addition, he paid the utility bills personally. Furthermore, she claims that she had domestic help, frequently dined out at expensive restaurants with her husband and vacationed with her husband and sometimes with her children, one of whom was sent to a private school.

Plaintiff testified that in the five months since she left the marital home she has been living with the three children at her brother's home and that she plans to establish a home for herself and the children. She estimates her current alimony and support requirements as the sum of $599.00 per week. In the weekly expense list she placed in evidence at the trial, plaintiff estimated, *inter alia*, that housing plus utilities will cost $165.00, food for four $135.00, clothing $56.00, vacations $45.00, car depreciation $15.00, gifts and charities $10.00, domestic help $25.00, and beauty parlor $13.00. She also included $50.00 "Misc. sundries, pocket money, misc. repairs" which, she explained, was intended to cover household repairs and pocket money for herself.

Plaintiff contends that because defendant's presentation of evidence tended to obscure rather than clarify his true economic status, she is entitled to an award based upon her proof of need (*Kay v. Kay*, 37 N.Y.2d 632, 376 N.Y.S.2d 443). Defendant did indeed seek to obscure his financial status. In his official form affidavit he declared that he had gross assets of $382,076.00 consisting of the marital residence valued at $150,000.00, $50,000.00 in other realty, $5,000.00 in household furnishings, $70,000.00 in a bank account, and a sixty percent interest in three corporations with assets of $37,000.00, $2,476.00 and $67,600.00 respectively. According to defendant's trial testimony, the assets of one of the corporations consisted of real property, some of which was income producing.

Nevertheless, in the witness box, defendant averred that his income is simply a weekly salary of only $300.00 ($241.00 net), but when questioned further he could not remember whether he had ever earned money other than his weekly check and interest from a savings account. The parties have $80,000.00 in a joint savings account, part of which, according to the defendant, came from plaintiff's deceased father, but he offered no proof to substantiate this claim and, in fact, said that he did not remember how much of the money plaintiff's father had contributed. Plaintiff denied that her father had contributed to the account.

Under cross-examination, defendant conceded that he inherited fifty percent of his father's estate when the latter died in 1969, but he could not remember how much cash was involved or even what the assets of the estate were. Although defendant testified that the $150,000.00 purchase price of the Bay Shore house was raised by a loan from one of his corporations, he conceded that he has paid no interest on the loan and claimed that he could not remember whether the loan agreement was ever reduced to a writing. He also declared that the loan agreement included a provision that he would make a partial repayment of the loan from the proceeds of a joint savings account once the assets were unfrozen, but it appears that the account was frozen long after the putative loan agreement was entered into. Plaintiff also owns eight acres either adjoining or near the Bay Shore property, including 200 feet of waterfront, and a house in Westbury which is occupied by his mother and sister. The 1976 Cadillac which he drives is registered in his name but of two additional automobiles purchased by one of his corporations, one, a 1976 Eldorado Cadillac, is registered in the name of a woman friend and the other, a 1976 Oldsmobile, is used by his son. In his official form affidavit, defendant declared that he spent $1,560.00 a year on clothing, but at the trial he testified that clothes cost him $300.00 every other year.

It is apparent from this evidence that the defendant has a greater income than what he testified to and that his capital assets, including those he controls in the various corporate entities, are very substantial. Although defendant's utter lack of candor brings the case within the rule in *Kay v. Kay*, plaintiff's estimate of her needs and her prior standard of living also is inflated. On cross-examination, she conceded that the $200.00 weekly payments which she said her husband gave her in addition to his paycheck really were irregularly made and that she had not had the benefit of domestic help in two and one-half to three years. The bank statements for the checking account maintained by the parties in 1974 indicate that in the 11 month period covered by the statements, the average deposits were $230.00 weekly and expeditures were $215.25 weekly. While the checks themselves are not in evidence and it is obvious that plaintiff received other financial benefits not reflected in the account, there is no real proof in this record to establish that the parties' pre-separation standard of living was — or that the plaintiff's current needs are — at the level of $599.00 per week. Indeed, her rental estimates (including utilities) is $653.50 per month, her food estimate for four persons exceeds what she estimated for six people in her official form affidavit a year before, and various other items in her expense list seem unreasonably high. She will be awarded support in the amount of $425.00 weekly of which $150.00 shall be allocated for support of Marianne, Barbara Ann and Anthony. Of course, this weekly allotment will be supplemented by income from the money plaintiff will be receiving from division of the frozen account and other jointly held assets. The weekly support provisions shall be retroactive to July 29, 1976.

The parties also seek an order directing a division of the personal property which remains in the Bay Shore house. Plaintiff demands a great many items, most of which are objected to by the defendant. Neither party offered any indication of the value of the personalty involved nor any other foundation for judicial adjudication. Unless the parties agree

to a division, they may apply at the foot of the judgment for further relief in this respect.

In their trial stipulation, the parties agreed that they would forthwith cooperate in liquidating the joint savings accounts and jointly held securities and that the proceeds of the savings accounts would be divided equally. However, the testimony at the trial and subsequent communications by both attorneys to the court related only to one savings account which was referred to as containing $80,000.00 and which the parties have frozen. Thus, the parties will be held to their stipulation and the judgment to be entered herein shall contain a provision directing the bank to distribute one-half the amount in that account to each of the parties.

The stipulation also provided that defendant would pay plaintiff's counsel fee as set by the court. In his affidavit of services, plaintiff's attorney seeks $13,000.00, asserting, *inter alia*, the complexity of his in-depth investigation of defendant's financial worth. Plaintiff has given him $400.00. It appears, however, that at an unspecified date in the past plaintiff had retained him to prosecute an action for divorce which, prior to "almost" being put on the calendar, culminated in a "purported reconciliation". Plaintiff paid him $3,500.00 on that occasion and he returned $1,000.00 to her. Defendant asserts that that sum was paid for the prosecution of this action and that services performed after the case was put on the calendar could not be worth an additional $10,000.00. Even though plaintiff apparently entered into two separate retainer agreements with her attorney, defendant's contention has some merit: if the case was ready for trial on the prior occasion it would seem that some of the necessary preparation had already been done. Accordingly, the plaintiff's attorney is entitled to a fee of $7,500.00.

Settle judgment.

s/LEON D. LAZER
J.S.C.

EXHIBIT "B"
JUDGMENT

Entered: January 25, 1977 at 10:58 A.M.

Index No. 75-4373

At a Special Term, Part V, of the Supreme Court of the State of New York, held in and for the County of Suffolk at the Supreme Court Building, County Center, Veterans Memorial Highway, Hauppauge, New York, this 21st day of January, 1977.

PRESENT:

HONORABLE LEON D. LAZER,

Justice.

ALBA FARINO,

Plaintiff,

—against—

JOSEPH FARINO,

Defendant.

The plaintiff having brought this action for a judgment of absolute divorce by reason of the cruel and inhuman treatment of the plaintiff by the defendant, and the summons and complaint, bearing the notation "ACTION FOR A DIVORCE" having been duly served upon the defendant personally within this State, and the defendant having appeared by JACK B. SOLERWITZ, ESQ., and the defendant having answered the complaint and interposed a counterclaim for a divorce on the ground of the cruel and inhuman treatment of the defendant by the plaintiff, and the

plaintiff having thereafter served a reply thereto, and the matter having come on for trial before me on July 20, 21, 22 and 23, 1976, and the parties having appeared before me, and the defendant having moved to withdraw those portions of his answer which denied plaintiff's allegations relative to her grounds for divorce as well as his counterclaim, which such motion was granted, and the plaintiff having presented written and oral proof of service, and in support of the essential allegations of the complaint, and the court having made and filed its memorandum decision dated December 20, 1976,

NOW, on motion of GOODMAN & GOODMAN, P.C., attorneys for the plaintiff, it is

ADJUDGED AND DECREED that the marriage between ALBA FARINO, plaintiff, and JOSEPH FARINO, defendant, is dissolved by reason of the cruel and inhuman treatment of the plaintiff by the defendant; and it is further

ADJUDGED AND DECREED that plaintiff is awarded custody of the infant children of the parties, MARIANNE, born on July 9, 1962; BARBARA ANN, born on July 7, 1961; and ANTHONY, born on August 28, 1959; and it is further

ADJUDGED AND DECREED that defendant is awarded custody of the infant children of the parties, JOSEPH, born on September 5, 1957; and FIORE, born on August 29, 1956; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant shall pay to the plaintiff, by check or money order drawn to her order and forwarded on Thursday of each week, commencing as of July 29, 1976, to the plaintiff at her residence, or at such other place as she may designate in writing, the sum of $275 per week as alimony, plus the sum of $150 per week for the maintenance of the three infant children, MARIANNE, BARBARA ANN and ANTHONY, making a total sum of $425 per week; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant shall pay to plaintiff's attorneys, GOODMAN & GOODMAN, P.C., One Old Country Road, Carle Place, New York, by check or money order, forwarded to their office within 30 days of entry hereof, the sum of $7,500 as and for their counsel fee herein; and it is further

ORDERED, ADJUDGED AND DECREED that the parties hereto be, and they hereby are, granted leave to apply at the foot of this judgment for further relief with respect to the division of personal property which was in the former marital abode at Bay Shore, New York, as of the date of the institution of this action; and it is further

ORDERED that EUROPEAN AMERICAN BANK, Brush Hollow Road, Westbury, New York, upon service upon it, be each of the parties hereto, of a certified copy of this decree, accompanied by the delivery to it of its requisite withdrawal slip signed by such party, pay or deliver to the party serving and delivering the same, one-half of the balance standing in its account #16-5059, together with one-half of all interest accrued to the date of such delivery, and such payment or delivery shall constitute a valid and sufficient release and discharge to said institution for such payment on account of such delivery.

ORDERED, ADJUDGED AND DECREED that the plaintiff may resume her maiden name to wit: RONGA.

ENTER

/s/LEON D. LAZER
JUSTICE OF THE SUPREME COURT

GRANTED: January 21, 1977
Lester M. Albertson,
Clerk

EXHIBIT "C"
MEMORANDUM

Motion No. 178
5/18/77

Special Term, Part V

By Lazer, J.S.C.
Dated July 25, 1977

SUPREME COURT, SUFFOLK COUNTY

ALBA FARINO,

Plaintiff,

vs.

JOSEPH FARINO,

Defendant.

GOODMAN, PENN, SCHEINFELD
& GOODMAN, P.C.
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Carle Place, New York 11514

JACK B. SOLERWITZ, ESQ.
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Mineola, New York 11501

On January 21, 1977, the plaintiff in this action was granted a divorce judgment which awarded her alimony and support and contained other financial provisions. The defendant has moved, inter alia, for downward modification of his support and alimony obligations under the decree and for deletion of the provision for retroactive payment contained in it. The plaintiff has cross-moved to punish the defendant for contempt for failure to make payments in accordance with the judgment, for the entry of a money judgment in the amount due, for an order of sequestration and compelling the posting of security, for counsel fees relative to the instant actions, and for ancillary relief. An evidentiary hearing has been conducted.

At the hearing the defendant testified that subsequent to the date of the entry of judgment he became ill and is now collecting disability insurance payments and living off his savings. The evidence adduced at the hearing belies his claim of poverty. In addition to his real property, defendant has important and majority interests in corporations which are engaged in the trucking business and the ownership of income producing real property. There is a significant cash flow from these entities — indeed in the case of the trucking company it amounted to a total of over $130,000.00 from January through April of this year and in 1976 various dump trucks were sold to Hendrickson Brothers for $300,000.00 in cash. Although it may not be the only reason the defendant and his corporation pay very little in income taxes, considering the large sums that pass through their hands, they do take substantial deductions for depreciation. Defendant could not explain how he had accumulated $70,000.00 in cash in the bank at the time of the divorce in the face of his claim that he never earned more than $20,000.00 in one year. The conclusion is that defendant is able to pay the amounts fixed in the original judgment, he is capable of working, and his failure to comply with the provisions of the divorce decree has been wilful. In her papers

plaintiff argues strongly for an order of sequestration. Since sequestration appears to be a viable remedy available to the plaintiff, contempt will not lie at this time (*Abualy v. Abualy*, 45 A.D. 2d 752, 357 N.Y.S 2d 16).

At the hearing, the parties stipulated that defendants' arrears from July 29, 1976 to May 24, 1977 totaled $15,700.00. Plaintiff may enter a money judgment in that amount and she may obtain sequestration of all defendant's assets for the purpose of recovering the arrears of $15,700.00 and assuring that the payments due to her will be kept current. The application for an order compelling the defendant to post security to guarantee performance of his obligations is denied without prejudice to renewal should sequestration fail.

With reference to the disputed claims relative to the division of personalty, the parties stipulated to have the court determine the issue based upon affidavits to be submitted after the hearing. In his affidavit, the defendant has agreed that the plaintiff is entitled to various specific items but he disagrees as to the balance demanded by plaintiff. In the order to be submitted hereon the defendant will be directed to arrange for the turnover of the items which he consented to return to the plaintiff. As to the rest, the requisite factual determinations cannot be made on the papers submitted except on a wholly arbitrary basis. Although plaintiff's lawyer has written to the court citing *Weseley v. Wesely*, —A.D. 2d — N.Y.S. 2d (N.Y.L.J., 7/13/77, p. 14, col. 1) to the effect that the personal property of matrimonial litigants should be determined in the matrimonial part, the fact that counsel's covenience was served by the submission of affidavits does not relieve the court of its obligation to make an informed factual determination. That cannot be done on these papers except to the extent the defendant agreed to plaintiff's demands. The request for division of personalty is severed from plaintiff's motion and set down for a separate evidentiary hearing to take place at a Special Term, Part V of this court on August 1, 1977 at 9:30 a.m., subject to the discretion of the justice there presiding.

A counsel fee of $1,500.00 is awarded to plaintiff's attorney for services rendered on this application.

Submit order forthwith.

/s/ LEON D. LAZER
J.S.C.

MEMORANDUM

Motion No. 178
5/18/77

Special Term Part V
By Lazer, J.S.C.
Dated July 26, 1977

SUPREME COURT, SUFFOLK COUNTY

ALBA FARINO,

Plaintiff,

vs.

JOSEPH FARINO,

Defendant.

GOODMAN, PENN, SCHEINFELD
& GOODMAN, P.C.
Attorneys for Plaintiff
One Old Country Road
Carle Place, New York 11514

JACK B. SOLERWITZ, ESQ.
Attorney for Defendant
170 Old Country Road
Mineola, New York 11501

The memorandum decision of this court dated July 25, 1977 relative to the above-captioned action is amended sua sponte to repair the omission of any reference to the original counsel fees awarded in the divorce judgment. The third sentence of the opinion is amended to read:

"The plaintiff has cross-moved to punish the defendant for contempt for failure to make payments in accordance with the judgment, for the entry of a money judgment in the amount due, for an order of sequestration and compelling the posting of security, for a money judgment in favor of her attorneys in the amount of $7,500.00 representing the amount of counsel fees awarded in the divorce decree, for counsel fees relative to the instant actions, and for ancillary relief."

The second paragraph on page 2 of the opinion is amended by the addition of the following sentence:

"Plaintiff's attorney, Goodman & Goodman, P.C., is granted a money judgment against the defendant in the amount of $7,500.00."

Submit order.

/s/LEON D. LAZER
J.S.C.

EXHIBIT "C1"

ORDER

Index No. 75-4373

At a Special Term, Part V, of the Supreme Court of the State of New York, held in and for the County of Suffolk at the County Center, Veterans Memorial Highway, Hauppage, New York, this 28th day of July, 1977.

PRESENT:

HONORABLE LEON D. LAZER,

Justice.

ALBA FARINO,

Plaintiff,

—against—

JOSEPH FARINO,

Defendant.

Defendant herein having, by order to show cause dated February 15, 1977, moved this Court for an order granting a downward modification of support and alimony obligations of the judgment of divorce heretofore granted herein, and for deletion therefrom of the provisions of alimony and child support retroactively to July 29, 1976, and for a downward modification of the award of counsel fees therein; and plaintiff having, by order to show cause dated February 16, 1977, moved this Court for an order adjudging the defendant to be in contempt for his failure to make payments in accordance with said judgment, for the entry of a money judgment in the amount due, for an order of sequestration or, in the alternative, directing the defendant to post reasonable security

for the payment of alimony and child support, for the amendment and modification of the judgment of divorce by awarding to plaintiff title and/or possession of the contents and household furnishings located at the former marital abode, and for an award of counsel fees for services rendered in connection with such application; and plaintiff having further cross-moved by notice dated February 28, 1977, for an order, *inter alia,* granting a money judgment in favor of her attorneys for the non-payment of the counsel fee awarded in the judgment herein;

AND this Court, by order dated April 29, 1977, having ordered that all of the aforementioned applications be set down for a hearing in this Court, and the matter having, in pursuance to said order, come on for hearing before the undersigned in this Court, commencing May 18, 1977, and each of the parties having appeared and offered testimony thereat, and due deliberation having been had thereon, and this Court having rendered and filed its decision dated July 25, 1977, and the amended decision dated July 26, 1977.

NOW, upon reading and filing the order to show cause of MR. JUSTICE FRANK X. ALTIMARI dated February 15, 1977, and the affidavits of JOSEPH FARINO, sworn to February 8, 1977, and the affirmation of JACK B. SOLERWITZ, affirmed February 11, 1977 in support thereof; the order to show cause of MR. JUSTICE FRANK X. ALTIMARI dated February 16, 1977, and the affidavits of MEYER F. GOODMAN and ALBA FARINO, both sworn to February 10, 1977 in support thereof; the plaintiff's notice of cross-motion dated February 28, 1977, and the affidavit of ALAN P. GOODMAN, sworn to February 28, 1977 in support thereof; the notice of supplemental cross-motion dated March 2, 1977, and the affidavit of ALAN P. GOODMAN, sworn to March 12, 1977, in support thereof; the affidavit of JOSEPH FARINO, sworn to March 8, 1977 in opposition to the cross-motion of plaintiff; the affidavit of JOSEPH FARINO, sworn to March 10, 1977, in opposition to plaintiff's order to show cause; the affidavit of ALBA FARINO, sworn to May 26, 1977, with respect to the disputed items of personal property; and the affidavit of JOSEPH FARINO, sworn to May 31, 1977 with respect to the items of personal property,

IT IS, on motion of GOODMAN, PENN, SCHEINFELD & GOODMAN, P.C., attorneys for the plaintiff,

ORDERED that defendant's motion for an order of downward modification of the judgment of divorce entered herein be, and the same hereby is, in all respects, denied; and it is further

ORDERED that the defendant's conduct in failing to comply with the judgment of divorce entered herein on January 25, 1977, with respect to alimony and counsel fees, was willful and calculated to, and did, impede, impair and prejudice the rights of the plaintiff; and it is further

ORDERED that plaintiff's motion for a money judgment, pursuant to Domestic Relations Law Section 244, is granted, and plaintiff, be, and she hereby is, awarded judgment in the sum of $15,700; and it is further

ORDERED that GOODMAN, PENN, SCHEINFELD & GOODMAN, P.C., attorneys for the plaintiff, be, and they hereby are, awarded judgment in the sum of $7,500 on account of defendant's failure to pay the counsel fee awarded to them in said judgment of divorce; and it is further

ORDERED that ALBA FARINO be, and she hereby is, appointed Receiver of the personal property of JOSEPH FARINO, defendant herein, and of the rents and profits of the real property of the said defendant, and she is hereby directed to take possession of said real and personal property, and hold the same until the further order of this Court, and to apply said personal property and rents and profits of said real property to the payment of the amounts due, and to become due, to the said ALBA FARINO, plaintiff herein, under and by virture of this Order, and under and by virtue of the judgment of divorce entered herein on January 25, 1977; and it is further

ORDERED that the said JOSEPH FARINO be, and he hereby is, directed and ordered to deliver the possession of said personal property and said real property to the Receiver herein; and it is further

ORDERED that any person, persons or corporations now having in its and their possession any of the property in which defendant has title, directly or indirectly, be, and they hereby are, directed to deliver the possession of said personal property and said real property of the said JOSEPH FARINO to the Receiver herein; and it is further

ORDERED that the said ALBA FARINO, Receiver herein, pay to herself, as plaintiff, out of the funds received by her as the property of the defendant, any sum or sums ordered to be paid by this Court for the support and maintenance of the plaintiff, and of the children of the parties; and it is further

ORDERED that the defendant, JOSEPH FARINO, be, and he hereby is, directed to forthwith arrange for the turnover of the items of personal property which he consented to return to the plaintiff, as specifically set forth in his affidavit of May 31, 1977; and it is further

ORDERED that plaintiff's motion for a division of the personalty of the parties be, and the same is, severed from the balance of plaintiff's motion, and the same be set down for a separate evidentiary hearing to take place at Special Term, Part V, of this Court, on August 1, 1977, at 9:30 A.M., subject to the discretion of the Justice thereat presiding; and it is further

ORDERED that within 10 days after service of a copy of this Order upon defendant's attorney, defendant pay to GOODMAN, PENN, SCHEINFELD & GOODMAN, P.C., attorneys for the plaintiff, an additional counsel fee of $1,500 for the services rendered by them on the instant application.

/s/LEON D. LAZER ENTER
JUSTICE OF THE SUPREME COURT

EXHIBIT "D"
ORDER ON APPEALS FROM JUDGMENT AND ORDER

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 15, 1978.

HON. VINCENT D. DAMIANI, *Justice Presiding*
HON. VITO J. TITONE,
HON. SAMUEL RABIN,
HON. FRANK A. GULOTTA, *Associate Justices*

ALBA FARINO,

Respondent,

vs.

JOSEPH FARINO,

Appellant.

In the above entitled cause, the above named Joseph Farino, defendant, having appealed to this court (1) from the alimony, child support and counsel fee provisions of a judgment of divorce of the Supreme Court, Suffolk County, entered January 25, 1977, and (2) from an order of the same court, dated July 28, 1977, which, *inter alia,* denied his motion for a downward modification of the economic incidents of the

judgment of divorce and awarded plaintiff a money judgment; and the said appeals having been submitted by Irving I. Erdheim, Esq., of counsel for the appellant and submitted by Meyer F. Goodman, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment insofar as appealed from is hereby unanimously affirmed, without costs or disbursements, and it is further

ORDERED that the order appealed from is hereby modified, on the law, by deleting the fifth, sixth, seventh, eighth and ninth decretal paragraphs thereof; and, as so modified, the said order is unanimously affirmed, without costs or disbursements.

Enter: IRVING N. SELKIN
Clerk of the Appellate Division

EXHIBIT "D-1"

MEMORANDUM BY THE COURT
63 A.D. 2d 691

In a matrimonial action, the defendant appeals (1) as limited by his brief, from the alimony, child support and counsel fee provisions of a judgment of divorce of the Supreme Court, Suffolk County, entered January 25, 1977, and (2) from an order of the same court, dated July 28, 1977, which, *inter alia*, denied his motion for a downward modification of the economic incidents of the judgment of divorce and awarded plaintiff a money judgment.

Judgment affirmed insofar as appealed from, without costs or disbursements.

Order modified, on the law, by deleting the fifth, sixth, seventh, eighth and ninth decretal paragraphs thereof. As so modified, order affirmed, without costs or disbursements.

We hold that award of alimony and child support was proper in the light of the defendant's net worth and the parties' actual marital standard of living (see *Hickland v. Hickland*, 39 N.Y.2d 1, 382 N.Y.S.2d 475, 346 N.E.2d 243; *Kay v. Kay*, 37 N.Y.2d 632, 376 N.Y.S.2d 443, 339 N.E.2d 143). Nor did the defendant set forth a significant change in circumstances such as would require a downward modification. Furthermore, in the circumstances of this case and of the parties, the award of counsel fees, in the judgment and the subsequent order, was well within the court's proper exercise of discretion.

However, enforcement of the judgment of arrears by means of sequestration was improper in this case. Sequestration is a drastic remedy which should be granted only if the defendant fails to pay a judgment of arrears, refuses to comply with an order to post reasonable security or leaves or threatens to leave the county where the property is located (see Domestic Relations Law, § 243; *Lombardo v. Lombardo*, 37 A.D.2d 993, 327 N.Y.S.2d 515; cf. *Matter of Hunter v. Hunter*, 41 A.D.2d 772, 341 N.Y.S.2d 953). Here the plaintiff is fully protected against default of payments by the bond in the amount of $23,200 which was furnished pursuant to an order to show cause dated August 11, 1977, and continued by order of this court dated November 4, 1977, which bond stands as full security for the payment of arrears.

EXHIBIT "E"
ORDER

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 10, 1978.

HON. VINCENT D. DAMIANI, *Justice Presiding,*
HON. VITO J. TITONE
HON. SAMUEL RABIN
HON. FRANK A. GULOTTA, *Associate Justices.*

ALBA FARINO,

Respondent,

vs.

JOSEPH FARINO,

Appellant.

In the above entitled cause, the appellant having moved for reargument of appeal from a judgment of the Supreme Court, Suffolk County, entered January 25, 1977, and from an order of the same court, dated July 28, 1977, or for leave to appeal to the Court of Appeals from an order of this court dated May 15, 1978, which determined said appeal;

Now, upon the papers filed in support of and in opposition to the motion; upon having the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion is hereby denied with $20 costs.

Stays contained in order to show cause dated June 20, 1978, vacated.

Enter: IRVING N. SELKIN,
Clerk of Appellate Division

EXHIBIT "F"

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-Sixth day of September, A.D. 1978.

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

---

2 Mo. No. 888

ALBA FARINO,

Respondent,

vs.

JOSEPH FARINO,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Deputy Clerk of the Court

EXHIBIT "G"

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of November A.D. 1978.

PRESENT, HON. CHARLES D. BREITEL,
Chief Judge, presiding.

---

2 Mo. No. 1058

ALBA FARINO,

Respondent,

vs.

JOSEPH FARINO,

Appellant.

A motion for reargument of a motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court

Supreme Court, U. S.
FILED
JAN 22 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1039

JOSEPH FARINO,

Petitioner,

vs.

ALBA FARINO,

Respondent.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF IN OPPOSITION FOR RESPONDENT

ALAN P. GOODMAN
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In The

Supreme Court of the United States

October Term, 1978

No.

JOSEPH FARINO,

Petitioner,

vs.

ALBA FARINO,

Respondent.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF IN OPPOSITION FOR RESPONDENT

COUNTER-STATEMENT OF FACTS

Petitioner at trial term did not seek an award to himself of either counsel fees or support. Nor, in moving the trial court for a downward modification of support ordered to be paid by him to the respondent, did the petitioner apply for counsel fees or to have the respondent directed to pay for his support.

The arguments of the petitioner addressed to the Appellate Division of the Supreme Court of the State of New York were confined to his contention that the awards of counsel fees and alimony to be paid by him were excessive. Only upon affirmance by that appellate tribunal did the petitioner, for the first time, attempt to raise the question of the constitutionality of the statute Domestic Relations Law §§236 and 237 by motion to reargue and for leave to appeal to the court of appeals. In opposition to that motion it was argued by respondent, *inter alia*, that the petitioner's said motion was untimely brought, 22 N.Y.C.R.R. §670.5, and additionally that upon a motion for permission to appeal to the court of appeals it is improper to urge as a basis therefor points of law not addressed at trial term or upon appeal. Both said motion and a subsequent motion addressed to the court of appeals for permission to appeal were denied without opinion. Petitioner then brought motion to reargue the court of appeals denial of leave to appeal, which said motion was likewise denied without opinion.

COUNTER-QUESTIONS PRESENTED

1. Whether the petitioner has demonstrated that the order of the New York Court of Appeals denying leave to appeal was grounded upon the constitutionality of the statutes sought to be reviewed?

2. Whether the petitioner has requisite standing to challenge the constitutionality of the statutes.

ARGUMENT

I.

Petitioner, by failing to timely raise the question of constitutionality in the state court has waived the issue.

As was observed by this Court in *Hulbert v. City of Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 at page 276:

> "In order to give this court the power to re-examine the judgment of the state court, the title, right, or privilege and immunity must be specifically set up or claimed at the proper time and in the proper way, and the right on which the party relies must have been called to the attention of the court in some proper way, and the decision must have been against the right claimed (cases cited)."

Furthermore, the Court continued at page 277:

> "This court will recognize and be governed by the rule of practice in a state court prescribing the requirements to be observed in order to save a question for review in that court, Erie Railroad Co. v. Purdy, 185 U.S. 148."

See also Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; *Walters v. St. Louis*, 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660.

The practice in the court of appeals is governed both by statute and rule C.P.L.R. §5601(b)(1) and (2) and 22 N.Y.C.R.R. §500.9(b). Said rule states that a motion for reargument may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons.

The said statute provides that, had a substantial constitutional question with appropriate standing in the petitioner been presented, and the issue of constitutionality been timely raised, an appeal to the court of appeals would have been of right.

Historically, the cases emanating from the court of appeals are in accord that an appeal involving the constitutionality of a statute, though not urged at trial term, will be accepted for review provided "a substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision." *Jongebloed v. Erie Railroad Company*, 296 N.Y. 912. Furthermore, to be properly raised at the Appellate Division, the argument of unconstitutionality must have been urged in the petitioner's brief, *Matter of Hood & Sons, Inc. v. Du Mond*, 297 N.Y. 209, 213. In the case at bar, it is conceded that the constitutional argument was raised for the first time in a motion to re-argue. *See also Matter of United States of Mexico v. Schmuck*, 293 N.Y. 768; *Reilly v. Stenhart*, 218 N.Y. 660; and *Rogers v. Laytin*, 81 N.Y. 642.

It is the firm rule of both this Court and the New York Court of Appeals that by reason of the omission to have timely raised the question of constitutionality, that issue has not been preserved.

The policy of this tribunal is in accord that a question of constitutionality must be raised, in express terms, at the earliest possible opportunity. *Honeyman v. Hanan*, 300 U.S. 14, 57 S. Ct. 350, 81 L. Ed. 476, and that a constitutional argument raised for the first time on re-argument is untimely. *Radio Stat. WOW v. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092, *mandate conformed to*, 19 N.W. 2nd 853, 146 Neb. 429, *mot. denied*, 66 S. Ct. 11.

The petitioner has quoted out of context the treatise Cohen and Krager, *Powers of the New York Court of Appeals*, §169 p. 642 in his petition for a writ of certiorari at page 5. Said treatise on point states:

> "Indeed, there is some authority in the Court of Appeals that, if only a general exception is taken to a judgment which can be assailed on constitutional grounds, it is sufficient to raise the constitutional question on appeal. This cannot be accurate, however. Clearly, this view would, to a great extent, nullify the main doctrine governing the raising of constitutional questions. Unquestionably something more than a merely general exception is required (citing *Purdy v. Erie Railroad Company*, 162 N.Y. 42)."

Moreover, the cases of *Massachusetts Nat. Bank v. Shinn*, 163 N.Y. 360 and *Howard v. The City of New York*, 234 N.Y. 505 as relied upon by the petitioner are inapplicable as, in both, the court of appeals, *sua sponte*, passed upon the constitutionality of the statute before it because of public policy considerations. This Court will assume want of proper presentation and the burden of showing otherwise is on the petitioner. *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572. It is respectfully submitted that the petition wholly fails in this respect.

II.

Petitioner lacks requisite standing to challenge the constitutionality of the state statutes.

The petitioner, by not having sought an award of alimony or counsel fee for himself, is not aggrieved by the refusal of the court of appeals to have considered the belated constitutional question. He does not urge that the statutes for which he seeks review, have denied him substantive due process or equal protection. To have standing to attack the constitutionality of a statute, a party must show that he has substained some direct injury as a result of the enforcement thereof. *Cramp v. Bd. of Pub. Instruction of Orange County, Florida*, 368 U.S. 278, 82 S.

Ct. 275, 7 L. Ed. 2d 785. A petitioner must show that he possesses a direct and substantial interest in the outcome of judicial review. *Hanson v. Denkla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, *reh. denied,* 358 U.S. 858, 79 S. Ct. 10, 3 L. Ed. 2d 92. It is not sufficient to show a denial of constitutional right. The petitioner must demonstrate that such a denial results in an injury to him. *Voeller v. Neilston Warehouse Co.,* 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322.

III.

The petition is untimely brought.

The Rules of the Supreme Court §41 "Briefs On the Merits-Time for Filing" require filing of petition for a writ of certiorari within forty five days (45) of the order noting or postponing probable jurisdiction. It is respectfully submitted that the controlling order was the order of the court of appeals dated September 26, 1978 denying leave to appeal to the court of appeals (Exhibit F to Petitioner's Brief) and not the subsequent order of that tribunal denying reargument (Exhibit G to Petitioner's Brief). As such, the docketing of the petition with this Court on December 27, 1978, is untimely, and proper grounds for dismissal.

As noted hereinabove, in the counter-statement of facts, the petitioner's motion to reargue addressed to the New York Court of Appeals was untimely brought, and this error was urged by the respondent in opposing said motion. The court of appeals subsequently denied the motion to reargue without opinion.

This Court has held that a defeated party who applies for a rehearing, and does not appeal from the final order within the time limited so to do assumes the risk of losing his right to appeal, if the lower court in denying a reargument does not extend the time for appeal. *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, 57 S. Ct. 382. Moreover, in a

case, as is the one at bar, in which the motion for reargument is untimely brought, and denied without consideration of the merits, the time in which to petition for a writ of certiorari commences from the date of the underlying order and not from the date of the order denying reargument. *Bernards v. Johnson,* 314 U.S. 19, 62 S. Ct. 30, 86 L. Ed. 11; *Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 63 S. Ct. 133, 87 L. Ed. 146.

IV.

The United States Supreme Court will not grant a petition for certiorari in a case in which the order sought to be revised may have been determined upon an adequate state ground.

The order of the New York Court of Appeals denying leave to appeal without opinion may have been grounded upon the untimeliness of the motion and or upon the failure to have properly raised the question of constitutionality. This tribunal will deny a petition for certiorari in any case in which the order sought to be appealed may have been based on non-federal or non-constitutional grounds. *Local 333B, United Marine Division v. Battle,* 101 F. Supp. 650, *aff'd,* 342 U.S. 880, 72 S. Ct. 178, 96 L. Ed. 661; and *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 60 S. Ct. 670.

Stated most strongly, this Court will not ordinarily grant certiorari of an order of a state court where the basis thereof makes consideration of an asserted federal question unnecessary. *Williams v. Kaiser,* 323 U.S. 471, 477, 65 S. Ct. 363, 367, 89 L. Ed. 398; and *Application of Baer,* 169 F.2d 770.

V.

The statutes of which review is sought are not repugnant to the Constitution in their application.

In the first instance it is respectfully pointed out that not every statute which separates persons into various classifications violates the Equal Protection Clause of the Constitution. As observed by the dissenting opinion of the Alabama Supreme Court in *Orr v. Orr,* 351 S.O. 2d 906, 907:

> "It is only invidious discrimination which offends the Constitution. Fergeson v. Skrupa, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93; and Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563."

Thusly, in *Kahn v. Shevin,* 416 U.S. 351, 94 S. Ct. 1734, 40 L. Ed. 2d 189 this tribunal upheld as constitutional a Florida statute granting widows an annual property tax exemption but affording no such benefits to widowers.

Furthermore, to be ruled unconstitutional a statute must be shown to be such in its application. Thusly, this Court has held in *Charleston Federal S. & L. Ass'n. v. Alderson,* 324 U.S. 182, 185, 65 S. Ct. 624, 627:

> "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, *as applied,* is repugnant to the Federal Constitution, treaties or laws (cases cited)." (Emphasis furnished.)

Thusly, and as argued above, it was incumbent upon the petitioner to demonstrate that the statutes, in their application, have resulted in injury to him.

Moreover, several lower courts in New York have, in a proper case, awarded alimony to a husband. *Thaler v. Thaler,* 89 Misc. 2d 315, 391 N.Y.S. 2d 331, *rev'd on other grounds,* 58 A.D. 2d 890, 396 N.Y.S. 2d 815, and a wife has been ordered to pay child support to her husband who has been awarded their custody. *Bender v. Bender* n.o.r. 405 N.Y.S. 2d 188.

Each of the statutes sought to be reviewed affords due process and equal protection by expressly requiring the court to have regard for both the circumstances of the case and the respective parties. *See also Kover v. Kover,* 29 N.Y. 2d 408, 328 N.Y.S. 2d 641, 278 N.E. 2d 886 and *Kay v. Kay,* 37 N.Y. 2d 632, 376 N.Y.S. 2d 443, 329 N.E. 2d 143.

As was observed in the New York Supreme Court case, *Cary v. Cary,* 94 Misc. 2d 257, 404 N.Y.S. 2d 534, 536:

> "Courts have been willing to interpret provisions which appear to be restrictive so as to permit an award to male litigants Thaler v. Thaler, 89 Misc. 2d 315, 391 N.Y.S. 2d 331, revd. on other grounds 58 A.D. 2d 890, 396 N.Y.S. 2d 815, and to uphold the constitutionality of statutes which may be so interpreted. Carter v. Carter, 58 A.D. 2d 438, 397 N.Y.S. 2d 88."

Specifically, in *Carter v. Carter,* 58 A.D. 2d 438, 397 N.Y.S. 2d 88, the Appellate Division, Second Department — the Appellate Division involved in the case at bar — upheld the constitutionality of parallel statutes FCA §§413 and 414, while deeming excised therefrom the descriptive words "father" and "mother", and in its place interpreting the statutes as inferring a co-equal responsibility of parents to provide support for children in accordance with their respective means. In so doing, that court relied on the authority of the United States Supreme Court as expressed in the decisions of *Crowell v. Benson,* 288 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598; *Panama R.R. Co. v.*

Johnson, 264 U.S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748, to the effect that a reviewing court will first determine whether a construction of an act is fairly possible whereby a determination of unconstitutionality can be avoided.

Ergo, aside from his lack of standing, the petitioner has failed to demonstrate that the statutes, in their application by the courts of New York, result in a denial of equal protection.

CONCLUSION

Upon each and every of the foregoing arguments, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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